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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1940

No. 537

314659

314US #2

KEN-KRU

A. ATWATER KENT,
Petitioner

v.

WALTER J. ROTHENSIES, Collector of Internal Revenue for the First District of Pennsylvania,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
THOMAS G. HAIGHT,
LEIGHTON P. STRADLEY,
MAURICE T. MOORE,
J. MARVIN HAYNES,
CHESTER J. MCGUIRE,
GEORGE G. TYLER,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1940

No. ———

A. ATWATER KENT,
Petitioner,

v.

WALTER J. ROTHENSIES, Collector of Internal Revenue for the First District of Pennsylvania,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of A. Atwater Kent respectfully prays for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment of that court entered in this case on May 22, 1941; and therefore shows as follows:

I.

A summary and short statement of the matter involved.

This is an action for the recovery of income taxes paid by the petitioner to the respondent for the calendar years 1932, 1933 and 1934. The United States Circuit Court of Appeals for the Third Circuit reversed (R. p. 99) a decision favorable to the petitioner in the United States District Court for the Eastern District of Pennsylvania (R. pp. 2-12).

On May 20, 1932, the petitioner created three irrevocable trusts (R. pp. 31, 43, 55) called, respectively, the Elizabeth Kent Van Alen Trust, the Virginia Tucker Kent Trust, and the A. Atwater Kent, Jr. Trust (R. pp. 13-14). Elizabeth Kent Van Alen, Virginia Tucker Kent and A. Atwater Kent, Jr. are the children of the petitioner (R. pp. 21, 33, and 46). The petitioner and a trust company were trustees of each of the trusts (R. pp. 13, 14).

These trusts, except for their names and except for the amounts of income to be currently paid to petitioner's children, are identical (R. pp. 21-58). In this petition, except where otherwise indicated, we shall refer to the Elizabeth Kent Van Alen Trust as being typical of the others.

The trust is to continue during the joint lives of the petitioner, the petitioner's wife, and Elizabeth (R. p. 25); or if petitioner and his wife should be divorced, during the joint lives of petitioner and Elizabeth (R. pp. 25-26).

Out of the annual income of the trust, beginning with the year 1933, there was and is to be paid to Elizabeth, if living, sums, beginning in 1933 with $10,000. and increasing at the rate of $5,000. per year until 1946 and subsequent years, when the annual payment to her, if living, is to be

$75,000. Thus in 1934, $15,000. was to be paid to Elizabeth from the income of that year; in 1935, $20,000. And so on[1] (R. pp. 22, 32).

If Elizabeth died prior to the termination of the trust, leaving a child or children her surviving, the trustees were, after Elizabeth's death, to pay to or for the use of each such child a maximum of $10,000. per year out of the income of the trust, provided, however, that not more than one-half of the annual income was to be so used (R. p. 22).

Each item of income received by the trustees, after the deduction of the payments described above to Elizabeth, if living, and to or for Elizabeth's children if Elizabeth were dead, was to be held and accumulated by the trustees until (a) the death of the petitioner, or (b) the June 30th or December 31st of the second year after its receipt, whichever event sooner occurred.[2]

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[1] In the Virginia Tucker Kent Trust, the $10,000 payment to Virginia Tucker Kent was to begin in 1937, if she were then living (R. pp. 34, 44-45); and in the A. Atwater Kent, Jr. Trust, in 1935 if A. Atwater Kent, Jr. were then living (R. pp. 46, 47).

[2] For example, the items of income received by the trustees between May 20, 1932 and June 30, 1932, after deducting any payments from income made to or for Elizabeth's children, if Elizabeth died prior to June 30, 1932, were to be held until the death of the petitioner or until June 30, 1934, whichever event sooner occurred. The items of income received by the trustees in the last half of 1932, after the deduction of any payments made to or for Elizabeth's children, if Elizabeth died prior to December 31, 1932, were to be held until December 31, 1934 or until the sooner death of the petitioner. The items of income received by the trustees in the first half of 1933, after deducting $5,000. (to be paid to Elizabeth, if living) or any payments from income to or for Elizabeth's children, if Elizabeth died prior to June 30, 1933, were to be held until June 30, 1935 or until the sooner death of the petitioner. And so on (R. p. 23).

On each June 30th and December 31st, beginning with the year 1934, if petitioner were living on that date, the trustees were to use not in excess of $5,000. of the accumulation being held to that date, to make up deficiencies in payments from income to Elizabeth or her children during the preceding year, and the balance of the accumulation, or the entire accumulation then being held, if there were no deficiencies in the payments to Elizabeth or her children in the preceding year, was to be paid to the petitioner.[3]

Upon the death of the petitioner any income being accumulated at the time of his death was immediately to be paid to petitioner's wife, if she were living and not divorced from the petitioner; or to Elizabeth, if she were living and if petitioner's wife were dead or divorced from the petitioner (R. pp. 24, 26); or to Elizabeth's husband and issue, in such proportions as Elizabeth should have appointed by

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[3] Thus, on June 30, 1934, if Elizabeth were living, and if during 1933 less than $10,000. was paid to her from 1933 income, or if Elizabeth had died prior to December 31, 1933 survived by a child or children living on June 30, 1934, and if during 1933 less than $10,000. was paid to or for the benefit of each such child, the trustees were to use not more than $5,000. of the income received by them between May 20, 1932 and June 30, 1932 to make up such deficiencies and were to pay the balance of such income to the petitioner (R. p. 23).

Similarly, on December 31, 1934, if petitioner were living $5,000. of the income received by the trustees during the last half of 1932 was to be used first to make up deficiencies in 1933 payments to Elizabeth or her children and the balance was to be paid to the petitioner. And so on. *As noted on pages 5 to 7 of this petition $10,000. of the 1934 accumulations in the Elizabeth trust, and $10,000. of the 1934 accumulations in the Atwater Jr., trust, were used to make up the 1935 deficiencies in income to Elizabeth and Atwater, Jr., and, although taxed to the petitioner, were never received by him.*

will (R. p. 25); and so on down through a long line of contingent remaindermen (R. pp. 25, 59-64), including a possible second wife of the petitioner and possible children by a possible second wife of the petitioner (R. pp. 63-64), the final one of which was The Atwater Kent Foundation, a charity (R. pp. 26, 64).

The trust provided, *inter alia*,

> "Under no circumstances or method of accounting shall the grantor, or his estate, his heirs, next of kin or assigns become entitled to any interest on accumulated items or to any income of the trust fund received, earned or accrued subsequent to the day which proves to be two years before the death of the grantor" (R. p. 24).

On December 31, 1932, 1933 and 1934, the trustees held taxable income received by them during said years, respectively (R. p. 15), which they included in federal income tax returns filed by them, respectively, for said years. The trustees paid the taxes shown to be due by said returns (R. p. 20).

On June 30 and December 31 in the years 1934 and 1935, respectively, the trustees paid to the petitioner the balances remaining of said amounts held on December 31, in the years 1932 and 1933, after the deduction of taxes paid by the trustees on said income, losses on sales of securities in which said income had been invested and certain incidental expenses (R. pp. 15-16, 71-76).

During the year 1935 the Elizabeth Kent Van Alen Trust and the A. Atwater Kent, Jr. Trust received no net income, and the trustees of these trusts were therefore unable to pay to Elizabeth and to Atwater, Jr. the amounts due them (R. pp. 16, 22, 32, 47, 57).

On June 30 and December 31, 1936 the trustees of the Elizabeth Kent Van Alen Trust paid Elizabeth, out of the

income received by them in 1934 and still held by them, a total of $10,000 to make up, to the extent permitted by the trust, the deficiency in her 1935 income. Similarly, on the same dates the trustees of the A. Atwater Kent, Jr. Trust paid Atwater, Jr., out of the income received by them in 1934 and still held by them, a total of $10,000 for the same purpose (R. p. 36).

On June 30 and December 31, 1936, the trustees of the three trusts, respectively, paid to petitioner the balances remaining of said amounts held on December 31, 1934 after the deduction of the payments to Elizabeth and Atwater, Jr. mentioned in the preceding paragraph, after the deduction of taxes paid by the trustees on said income, after the deduction of losses on sales of securities in which said income had been invested, and after the deduction of incidental expenses (R. pp. 16, 75-76).

Respondent collected taxes from the petitioner for the calendar years 1932, 1933 and 1934 based upon the inclusion in petitioner's income of the *total* amount of the taxable net income received by the trustees during said years and held by them, respectively, as aforesaid on the last day of each of said years (R. pp. 18-19). From the above it is apparent that, while the respondent collected income taxes from the petitioner upon the addition of the total amount of the taxable net income received by the trustees and held by them at the end of the calendar years 1932, 1933 and 1934, respectively, not only was it impossible to tell for whom such income was accumulated during each of the three years respectively, but *the petitioner in fact never received the amount of the accumulated income upon which he was taxed.* The following table shows the amounts taxed to the petitioner for the years 1932, 1933 and 1934 and

the amounts actually received by him in 1934, 1935 and 1936:[4]

Taxable Year	Accumulations Taxed to Petitioner	Accumulations Actually Received By Petitioner
1932	$255,500.	$208,100.[5]
1933	159,500.	149,500.[6]
1934	154,600.	120,400.[7]

The difference between the accumulations in column 2 and the payments in column 3 for the years 1932 and 1933 is principally due to the payment by the trustees of income taxes on the accumulated income. Of the difference for 1934 ($34,200.), however, $20,000., or over fifty-eight per cent. (58%) thereof, was due to payments which the trustees were required to make to Elizabeth and Atwater, Jr.

The petitioner and the three trusts during the years in question kept their books of account and filed income tax returns upon the cash receipts and disbursements basis (R. p. 20).

After the filing (R. pp. 19-20, 77-85) and rejection of claims for refund (R. p. 20) the petitioner brought suit against the respondent in the United States District Court for the Eastern District of Pennsylvania for the recovery of the taxes paid as aforesaid. The district court entered a judgment in favor of the petitioner (R. p. 2). The respondent appealed to the United States Circuit Court of Appeals for the Third Circuit which reversed the district court (R. p. 99).

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[4] In this petition and brief, dollars are, for convenience, stated in terms of the nearest one hundred.

[5] Received in 1934.

[6] Received in 1935.

[7] Received in 1936.

II.

A statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment of the Circuit Court of Appeals for the Third Circuit.

(a) The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States.

The Supreme Court of the United States has jurisdicton to review the judgment of the Circuit Court of Appeals by reason of the provisions of Section 347 of Title 28 of the Code of Laws of The United States of America, 1934 ed.

(b) The date of the judgment sought to be reviewed and the date upon which the petition for a writ of certiorari is presented.

(1) The date of the judgment sought to be reviewed is May 22, 1941 (R. p. 99).

(2) The date upon which the petition for a Writ of Certiorari is presented is August 22, 1941.

III.

The Question Presented.

The question presented is as follows:

Is the income of a trust, which is held or accumulated for future distribution to a person or persons whose identity cannot be determined until the happening of unpredictable events, but who may or may not be the grantor, held or accumulated for future distribution to the grantor?

IV.

The reasons relied on for the allowance of the writ.

The reasons relied on for the allowance of the writ of certiorari are as follows:

1. The Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Commissioner of Internal Revenue* v. *Dean,* 102 F. (2d) 699, on the same matter. In the *Dean* case it was held that income held by a trustee on December 31 for distribution to a beneficiary, *if living,* on the succeeding January 3, was not held for distribution to said beneficiary but was held for distribution to unascertained persons or persons with contingent interests. In the instant case, the Circuit Court of Appeals for the Third Circuit has held that income held by a trustee on December 31, for distribution to the petitioner, if living, on the June 30 and December 31 of the second succeeding year, was held for future distribution to the grantor and was not held for future distribution to unascertained persons or persons with contingent interests.

The Government did not apply to this court for a writ of certiorari in the *Dean* case.

2. The Circuit Court of Appeals for the Third Circuit has decided an important question of federal law,—namely,

> That the income of a trust which is held or accumulated for future distribution to a person or persons

> whose identity cannot be determined until the happening of unpredictable events, but who may or may not be the grantor, is held or accumulated for future distribution to the grantor.

which has not been, but should be settled by the Supreme Court of the United States.

3. The Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of the United States Board of Tax Appeals in a series of cases on the same matter. These cases are *Boeing* v. *Commissioner,* 37 B. T. A. 178; *Pyeatt* v. *Commissioner,* 39 B. T. A. 774; *Moore* v. *Commissioner,* 39 B. T. A. 808; *Estate of Edward Johnson* v. *Commissioner,* unreported memorandum decision entered May 29, 1939; *Ward* v. *Commissioner,* 40 B. T. A. 225; *McLean* v. *Commissioner,* 41 B. T. A. 565; *Wilson* v. *Commissioner,* 42 B. T. A. 1260 and *Baker* v. *Commissioner,* 43 B. T. A. 1029.

In only one of these cases (*Wilson* v. *Commissioner,* 42 B. T. A. 1260, *supra*) *has the government prosecuted an appeal on the point involved in this case.*

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this cause to the end that the said cause may be reviewed and determined by this court according to law; and that

your petitioner may have such other and further relief as to this court may seem proper and in conformity with law.

And your petitioner will ever pray.

ROBERT H. MONTGOMERY,
JAMES O. WYNN,
LEIGHTON P. STRADLEY,
J. MARVIN HAYNES,
CHESTER J. MCGUIRE,
Counsel for Petitioner.

Dated: August 22, 1941.